Not Only the State: Torture and Enforced Disappearance by Non-State Armed Groups

Position Statement on the Proposed Laws Against Torture and Enforced Disappearance in the Philippines

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The Fourteenth Congress (2007-10) of the Philippines is poised to pass separate important breakthrough criminal laws against torture and enforced disappearance. The House of Representatives at least has already passed on third reading the bills for this purpose, while their counterpart bills in the Senate are still with its Committee on Justice and Human Rights prior to second reading plenary deliberation. In both chambers of Congress, the leading versions of these bills limit the definition of torture and enforced disappearance to that "inflicted by or at the instigation of or with the consent or acquiescence of a person in authority or agent of a person in authority," or "committed by government authorities or by persons or groups of persons acting with the authorization, support or acquiescence of such persons in authority," in short, state agents.

We, the undersigned organizations and individuals strongly believe and advocate that the corresponding law's definitions of torture and enforced disappearance not be limited to commission by state agents, by dropping or deleting such qualifications as the above-quoted. The main reason for this position is the factual reality that torture and enforced disappearance are also committed by non-state armed groups (NSAGs) and other non-state actors (NSAs). These may not be as numerous as those committed by state agents, but the torture committed by NSAGs often times rivals state-inspired torture in its inhumanity, severity and depravity. From the point of view of the victims of acts of torture or enforced disappearance, there is no difference whether it is committed by a state or non-state perpetrator.

We want to be very clear, however, that the state still has the primary and special responsibility to take effective measures to prevent and suppress torture and enforced disappearance. But, as a matter of criminal legislation, all acts of torture and enforced disappearance, irrespective of the perpetrator, should be prohibited. Acting in an official capacity can instead be made a qualifying, aggravating element or circumstance.

_Factual Reality and Field Experience

Perhaps the clearest case in point for this position was the anti-infiltration purges in the Communist Party of the Philippines-New People's Army (CPP-NPA) during the 1980s, in which at least a thousand or so of its cadres, members, commanders and fighters were tortured, forcibly disappeared or extra-judicially killed within the CPP-NPA in a number of regions, most notably Mindanao ("Kampanyang Ahos") and Southern Tagalog ("Oplan Missing Link"). The latter purge was notably documented in a book by one of its survivors, now NGO worker Robert Francis B. Garcia, *To Suffer Thy Comrades: How the Revolution Decimated Its Own* (Manila: Anvil Publishing, Inc., 2001). What is striking from the torture stories here and of accounts of other CPP-NPA purges is that the torture in many cases rivals that suffered at the hands of even the most notorious military torturers during the dark days of martial law. There is no fail-safe reassurance that this cannot and will not happen again, even within the breakaway factions which used to be part of the CPP-NPA during the time of the purges.

In his 2007 Mission to Philippines, the UN Special Rapporteur on Extrajudicial Executions Philip Alston found these executions in recent years to have been mainly committed by soldiers of the Armed Forces of the Philippines (AFP), but at the same time found "The NPA does commit extrajudicial executions, sometimes dressing them up as 'revolutionary justice,'…" If NSAGs like the NPA can be said to commit the "graver" crime of extra-judicial killings, then with more reason can they be said to commit the "less grave" crimes of torture and enforced disappearance. In fact, these three crimes often go together as part of a pattern, as shown in the earlier CPP-NPA purges.

More recently, during the attacks by certain units of the Moro Islamic Liberation Front (MILF) against some Christian settler communities in Central Mindanao at the height of the controversy on the Memorandum of Agreement on Ancestral Domain (MOA-AD) in August 2008, the international human rights organization Amnesty International noted, among others, "hostage taking with possible torture or other cruel, inhuman or degrading treatment or punishment (other ill-treatment) by the MILF." (Amnesty International, *Shattered Peace: the human cost of conflict in Mindanao, special report*, October 2008, p. 4)

Most recently, NGO worker Milet B. Mendoza, one of many kidnap (akin to enforced disappearance) victims of another NSAG, the Al-Harakatul Al-Islamiyya, better known as the Abu Sayyaf Group (ASG), had this to say about the kind of torture she suffered while in their hands from September 15 to November 14, 2008: "The group that held me was adept at psychological torture… undergoing something like a mock execution. The terror that gripped me, which remains to this day, is indescribable… Two men barged into my cell and dragged me out into the dark. They tied my hands behind my back, taped my mouth, and pushed me down on my knees… One of the men pushed the barrel of his rifle against my head while the other pulled out his bolo and raised it to decapitate me…. Then my captors stopped, having achieved their aim of terrorizing me, showing me they had the power of life and death over me…. I do not remember anymore what happened after that, only that I was back in my cell, curled up, shaking with fear and in tears." (Milet B. Mendoza, "Prayers sustained me during captivity," *Philippine Daily Inquirer*, April 12, 2009, pp. A1, A7)

Notwithstanding these and many other torture and enforced disappearance experiences at the hands of NSAGs, some of the main proponents of the relevant bills, including human rights advocates, chose to limit the definition of these crimes to commission by state agents. Their main reasons given for this are that: the corresponding definitions in the 1984 UN Convention Against Torture (CAT) and the 2006 UN Convention Against Enforced Disappearance (CAED) are limited to commission by state agents; NSAs should be covered by other existing criminal law; and the problem of enforcing the proposed laws as against NSAGs. But these are not meritorious reasons, some are even non-

reasons.

New Legal and Human Rights Thinking

As the great jurist Oliver Wendell Holmes, Jr. once said, “The life of the law has not been logic; it has been experience.” And so, it should be noted that the CAT itself, in its Art. 1(2), provides that its definition of torture is “without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.” And it should be noted that the CAED itself, and its Art. 37, provides that it shall not “affect any provisions which are more conducive to the protection of all persons from enforced disappearances and which may be contained in: a) the law of a State party; b) International law in force for that State.” It also provides, in its Art. 43, that it is “without prejudice to the provisions of international humanitarian law.”

In the 1998 Rome Statute of the International Criminal Court, which is considered the highest development of international criminal law so far, both torture and enforced disappearance are key specific acts which may be committed as part or elements of a crime against humanity, under its Art. 7, par. 1 (f) and (i). The Rome Statute definitions of the crimes of genocide, crimes against humanity, and war crimes – “the most serious crimes of concern to the international community as a whole” – are not limited to commission by state agents. In fact, the very first case prosecuted in the ICC is against leaders of a NSAG, the Lord’s Resistance Army (LRA) of Northern Uganda.

This actually represents new legal thinking in recent years on human rights (HR), that not only states but also NSAs, esp. NSAGs, have certain HR obligations and consequently may also commit HR violations. A growing number of international treaties (e.g. the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict), UN-related resolutions, special reports, pronouncements of international and non-governmental bodies, judicial decisions, and scholarly writings carry that new HR thinking. Much of these have been noted and synthesized in the book by International Law Professor Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2005).

In the particular HR matter of torture, the international NGO Redress Trust-London published a major policy study *Not Only the State: Torture by Non-State Actors – Towards Enhanced Protection, Accountability and Effective Remedies* in May 2006, which acknowledged the Philippine inputs, particularly from the case of the CPP-NPA purges. The international legal trend is quite clear to the effect that NSAGs definitely have responsibilities under the international prohibition against torture, especially that committed against children. Jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) has already determined that rape can be considered as torture in the context of war crimes, even if committed by NSAs.

The old or traditional thinking on HR is that its international legal regime was established for the protection of the individual from abuses of the powerful state which is supposed to have a monopoly of legitimate armed forces. But, over time, it has become clear that some power is also derived from having “illegitimate” armed forces. And not only political power but also HR abuses can “grow out of the barrel of a gun.”

Torture and enforced disappearance are violations not only of HR but also of international humanitarian law (IHL). This international law of armed conflict applies to both conflict parties, which can be a state and a NSAG in the case like that in the Philippines of internal or non-international armed conflicts on the Communist and Moro fronts. One of the most basic rules for such conflicts, found in common Article 3 of the 1949 Geneva Conventions, is the absolute prohibition against “cruel treatment and torture” and “outrages upon personal dignity, in particular

humiliating and degrading treatment." This prohibition, as well as another one against enforced disappearance, are considered rules of customary IHL, according to an authoritative 2005 study by the International Committee of the Red Cross (ICRC) which indicates them as Rules 90 and 98, respectively.

There is also a comprehensive IHL regime which governs the matter of missing/unaccounted persons and their families as a result of armed conflict or internal violence, and this covers enforced disappearances committed by all parties to an armed conflict, including NSAGs. The ICRC has legal advisory material on this, particularly a 2003 tract entitled The Missing: Action to resolve the problem of people unaccounted for as a result of armed conflict or internal violence and to assist their families, which includes recommendations and a checklist for drafting national legislation. In the latter matter, let us avail of "the best created by humanity" in terms of international law.

In the 1998 Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CARHRIHL) between the Government of the Republic of the Philippines (GRP) and the National Democratic Front of the Philippines (NDFP), there are mutually agreed prohibitions against "involuntary disappearances," "physical or mental torture," and "other inhuman, cruel or degrading treatment, detention and punishment," and a provision for the search and protection of "missing persons." So, it is quite clear here that a particular NSAG, the NDFP which represents the CPP-NPA, has undertaken obligations pertinent to the HR-IHL matters of torture and enforced disappearance.

Criminal Law, Enforcement and Wider Application

Some of the main proponents of the criminal laws against torture and enforced disappearance chose to limit the definition of these crimes to commission by state agents for the reasons that NSAs should be covered by other existing criminal law and that there would be the problem of enforcing the proposed laws as against NSAGs. The problem of enforcement against NSAGs is a non-reason because one can say the same thing as far as other existing criminal law is concerned. And what would such other existing criminal law be? The common crimes of physical injuries or grave coercion do not quite capture the essence of torture. Neither do the common crimes of kidnapping or serious illegal detention quite capture the essence of enforced disappearance. It would be like dispensing wrong medicine based on a wrong diagnosis of an illness. HR and IHL problems are better, if not best, addressed by solutions informed by HR and IHL.

Finally, some of those, including HR advocates, who chose to limit the definition of these crimes to commission by state agents say that, after having come this far in the legislative process for passing important breakthrough criminal laws against torture and enforced disappearance, it would be better not to risk any complications in terms of political support by making the laws to be of wider application, particularly to cover commission by NSAGs. But surely, ordinary people, and especially the victims of various acts of torture and enforced disappearance and their relatives and friends, will support such a wider application of these laws.

This does not mean covering up or diluting the state's primary responsibility in these matters. This rather means that NSAs that commit these crimes can also be held accountable and liable for them. Most importantly, this means that all kinds of victims of all kinds of torture and enforced disappearance, no matter by whom perpetrated, can be protected by the best possible law. In practice, the proper cases can be filed and prosecuted against whoever perpetrators, whether state or non-state. The volume and merits of these cases will then show from which entities come most of the perpetrators. But before that, let us get the laws right – by their definitions of torture and

enforced disappearance not being limited to commission by state agents, by simply dropping or deleting this kind of qualification. Acting in an official capacity can instead be made a qualifying, aggravating element or circumstance.

It is better and easier to improve a law before rather than after it is passed. In the end, we live up to the spirit of “all human rights for all.” Thank you.

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Quezon City, Philippines, 24 April 2009.

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